UNITED NATIONS

GENERAL ASSEMBLY

Distr:
GENERAL

A/CN.9/409/Add.1
27 February 1995

ORIGINAL: ENGLISH/
SPANISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-eighth session
Vienna, 2-26 May 1995

DRAFT MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

Compilation of comments by Governments and international organizations

Addendum

CONTENTS

Page

States

Japan 2
Mexico 5
Namibia 8

B. Intergovernmental international organizations

Bank for International Settlements (BIS) 8

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A. States

JAPAN

[Original: English]

Japan considers that the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, approved by the UNCITRAL Working Group on EDI in its 28th session, is of great importance, since it constitutes a solution at the international level to the difficult problem of removing legal obstacles to the use of EDI in commercial transactions. In general, this draft Model Law is formulated in a flexible manner, as it should be, given the diversity in national legal systems and the principle of party autonomy. It is expected that this Model Law, when adopted, will serve as a useful point of reference for any country intending to amend its national laws to meet the needs of an age of electronic commerce. Nevertheless, it is our view that in its present form, the draft Model Law contains provisions which leave room for improvement. The following comments are offered without prejudice to our final position on the draft Model Law.

Article 2

According to the paragraph (a) definition of "data message", a key notion of this Model Law, information becomes a data message when it is generated, stored or communicated by any of the means covered by that paragraph. The notion of a data message in this Model Law is there defined in such a way as to mean the information thus processed through electronic means. On the other hand, the expression "information in a data message" used in paragraph (f) suggests that the term "data message" might mean a container of information, as it were, something distinct and separate from the information itself. It will, therefore, be desirable for the guide to the Model Law to give a comprehensive explanation of the notion of "data message" as used in the Model Law.

Article 7

Although there is some doubt as to whether the requirement of sub-paragraph (a) of paragraph (1) should be an essential element of the notion of "original", if the purpose of this sub-paragraph is to make it clear that the display of information through an electronic device may substitute for the presentation of information in paper documents required by law, then it would be more appropriate to use the same terminology as in Article 5 Writing, where, in addressing the question of presentation of information in an EDI environment, the expression "accessible" is used instead of "display".

With regard to sub-paragraph (b) of paragraph (1) of Article 7, we fear that the words "it was first composed in its final form" might create problems with regard to application. In an EDI environment, the same information could be recorded in different forms at one time, as well as at different times. In such an environment, what does "its final form" mean? How should, or could, the question of when the information was first composed in its final form be decided? The guide to the Model Law should address the point by illustrating how this sub-paragraph would operate in practice.

Article 8

As a matter of principle, the question of weight of evidence should be left to the trier of fact. Any provisions of this Model Law in this area should be limited to stipulating factors or guidelines to be taken

into account in evaluating the evidential value of a data message so as to avoid the risk of interfering with the free discretion of judges (see para. 102 of A/CN.9/373). From this point of view, the first sentence of paragraph (2) of Article 8 is unnecessary, as it is self-evident that any information, in whatever form, should be given due evidential weight, once admitted as evidence. To delete this sentence and retain only the second sentence will suffice for the purpose of this paragraph.

The reference to Article 8, in paragraph (3), should be to Article 7. In any case, however, paragraph (3) should be deleted, as the purport of this paragraph is already sufficiently covered by Article 7 and the second sentence of paragraph (2) of Article 8.

Article 9

If sub-paragraph (c) of paragraph (1) is to require the retention of transmittal information in an EDI environment even where the retention of such information is not required by the relevant provisions of national law in a paper-based environment, this sub-paragraph might be too restrictive, as it imposes a more stringent requirement regarding the retention of information in the form of data messages than in the form of paper documents. The guide to the Model Law should explicitly state that this Article is not intended to burden information in the form of a data message with requirements beyond what is required by national law in respect to the retention of transmittal information.

Article 11

As a matter of drafting, the word "deemed" used in paragraph (1) is considered to be inappropriate. That a message communicated by the originator or by any authorized person is that of the originator goes without saying. There is no need to "deem" such a message to be that of the originator by operation of law. The words "deemed to be" should be deleted and, consequently, the entire paragraph (1) might be said to be unnecessary.

With respect to paragraph (3) of Article 11, if the opening words "Where paragraph (1) and (2) do not apply" are to be retained, the logical conclusion would be to choose the word "deemed" in brackets in the chapeau, because, if these opening words are retained, the prerequisite for the application of paragraph (3) might be considered as that it has been established that paragraph (1) is not applicable, namely that a data message was neither communicated by the originator himself nor by a person authorized by him. Obviously, this prerequisite serves as counter-proof to rebut the presumption that the data message is that of the originator. Hence, choosing the word "presumed" in the chapeau, while at the same time retaining the opening words, would be self-contradictory.

On the other hand, however, if paragraph (3) is made a "deem" provision, a policy problem will arise, as an addressee who properly applies a procedure agreed to by the originator is, as the draft now stands, protected only by a presumption under paragraph (2). It does not seem reasonable to give greater protection to an addressee who does not apply such a procedure.

We are of the view that in order to maintain a proper balance between paragraphs (2) and (3), paragraph (3) should be a presumption provision, which would then protect the addressee who, for one reason or another, did not, or was not able to, apply an agreed procedure properly, but nevertheless deserves the protection of the presumption. Assuming that the substance of the present sub-paragraphs (a) and (b) of paragraph (3) is to be maintained as requirements for such protection, which might be questionable if paragraph (3) is to provide for a presumption, the following new paragraph (3) is suggested with a view to clarifying the subject matter of the presumption.

New paragraph (3)

"Without prejudice to paragraphs (1) and (2),

(a) a person whose actions resulted in the data message as received by the addressee is presumed to have the authority to act on behalf of the originator in respect of that data message if the relationship of that person with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify the data message as its own; or

(b) a data message is presumed to be that of the originator if the addressee ascertained that the data message was that of the originator by a method which was reasonable in the circumstances.

However --------[unchanged]----------"

In this connection, the guide to the Model Law should provide explanation as to the character and scope of the "relationship" in sub-paragraph (a) of paragraph (3). For instance, should a person entrusted with the task of developing the originator's information system, and thus knowing the method for identification, be regarded as falling within the scope of this sub-paragraph? Moreover, in view of the similarity of and possible conflict between Article 11 of this Model Law and Article 5 of the UNCITRAL Model Law on International Credit Transfers, the guide to the Model Law should clarify how these two Model Laws interrelate with each other in application.

As regards paragraph (4), by virtue of the presumption provided in the first sentence of that paragraph, the burden of proof for establishing that the data message as received by the addressee contains an error is on the person claiming the existence of such an error. In our view, establishing that transmission resulted in an error in the content of a data message or in the erroneous duplication of a data message should be sufficient to rebut the presumption, whether or not it is established that the addressee knew or should have known of the error, thus, being irrelevant. Accordingly, the words "if the addressee knew ------ in transmission" in the second sentence of this paragraph should be deleted.

On the other hand, we note that there are cases where there is an agreement between the originator and the addressee as to a method for ascertaining the integrity of a data message apart from an agreement as to a method to identify the origin of a data message as envisaged in paragraph (2). It could be argued that an addressee who ascertained the integrity of a data message in accordance with such an agreement deserves more protection than that of a mere presumption provision. If this argument is accepted, there would be a need for a provision, either in the form of a redrafted paragraph (4) or a new paragraph, to the effect that the content of a data message is deemed to be that received by the addressee, if the addressee ascertained the integrity of the data message by properly applying a procedure previously agreed to by the originator, unless the addressee knew or should have known, had it exercised reasonable care, that the data message contained an error.

Paragraph (5) is unnecessary, as it states the obvious.

Article 12

The present formulation of paragraph (3) gives the addressee the option of sending the acknowledgement at any time it considers it advantageous to give effect to the originator's message, where the originator has not specified the time within which the acknowledgement must be received. In order to avoid the addressee's being permitted to speculate at the risk of the originator, the words "until the acknowledgement is received" should be replaced by the words "unless the acknowledgement is received

within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time".

Furthermore, since it is our understanding that the question of whether or not a data message conditional upon receipt of the acknowledgement has any legal effect should be governed by applicable law, the expression "the data message has no legal effect" in this paragraph is inappropriate. The same wording as used in sub-paragraph (b) of paragraph (4), that is, "the originator may treat the data message as though it had never been transmitted, or exercise any other rights it may have", is preferable.

Paragraph (4) contemplates a situation where the originator, while specifying the time within which the acknowledgement must be received, does not state that the data message is conditional on receipt of the acknowledgement. It is difficult, however, to imagine that such a situation will occur in practice, since it may reasonably be assumed that a data message is conditional on receipt of the acknowledgement, when a time for receipt is specified, or agreed to. The words "within the time specified or agreed or ---- specified or agreed" should, therefore, be deleted.

MEXICO

[Original: Spanish]

With reference to the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, the following are proposed comments by the Government of Mexico:

1. The Mexican Government welcomes the completion by the Working Group of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, and trusts that this Working Group, at its next session, will complete the guide for the enactment of the Model Law, so that both documents can be considered at the next plenary session of the United Nations Commission on International Trade Law.

The significance of the use of electronic communication media is increasing daily, in both domestic and international commerce. An important effect of the use of these electronic media in the communication and archiving of trade information will be the multiplication of trade exchanges and the reduction of their cost.

In spite of the fact that the use of electronic media is such a daily practice, already forming part of the culture of the business world, it lacks specific legal regulation, since there are practically no laws in force, judicial precedents or legal traditions recognizing its value and legal consequences; as a result, there is a major legal vacuum.

The discrepancy between commercial practice and legal regulation is a cause of uncertainty and an obstacle to international trade. This obstacle, to the extent possible, should be removed through the drafting of legal rules aimed at providing juridical solutions which will remove the doubts and uncertainties of commercial operators.

It is highly probable that, in the future, practice and jurisprudence will lead to an evolution in the provisions offered by the draft. Electronic commerce is a very recent phenomenon, and a legal culture, derived from experience, is still lacking; only long practice can generate such a culture. In spite of this, the set of provisions in the draft Model Law will serve as a starting-point for the evolution in question and,

what is more important, will help to guide legislators in drafting a minimum of legal provisions to regulate the phenomenon.

The Mexican Government considers that the draft, as offered by the Working Group, is a satisfactory result and can be adopted by the Commission at its next session. Nevertheless, we think that it would be useful to suggest some points for discussion with the aim of improving the final drafting.

2. The title of the Model Law should be changed to "Model Law on Legal Aspects of Electronic Commerce".

This suggestion was made almost at the end of the last session of the Working Group and, given its novelty, did not obtain the necessary support to be adopted (see document A/CN.9/406, paras. 75-77).

We consider the arguments in favour of changing the title to be valid, since the use of the term EDI is, at least, confusing; this term covers only one of the means of communication regulated. On the other hand, the reference to "related means of communication" is vague and says little to anyone who is not fully familiar with the content of the Model Law. In other words, the title may lead to confusion and, as was said in the Working Group, it is "not very commercial".

The expression "electronic commerce", on the other hand, is becoming increasingly widespread and accepted in practice. Reference in the title to "electronic commerce" will give anyone who did not participate in the preparatory work a quicker and more exact indication of the content and importance of the Model Law.

Moreover, the fact that the sphere of application is clearly delimited, as can be seen from article 1 and subparagraphs (a) and (b) of article 2, will avoid any doubt regarding the sphere of application of the Law and the absence of a definition in it of the concept of "electronic commerce". The title does not describe the scope of application and is no more than a summary indication of the content of the document.

3. The definition of the term "intermediary" can and should be deleted, with any necessary explanations given in the guide to enactment. The definition is unnecessary. What is more, it suggests, at first reading, that the Model Law is concerned with intermediaries, which is not the case. The Working Group decided to deal with the relationship between the originator and the addressee and not the relationship between these parties and any intermediary.

At the end of the deliberations, the definitions were reviewed and it was noted that the term "intermediary" was used only in two of the definitions and not in any other article. The definitions in question are those of "originator" and "addressee" in subparagraphs (c) and (d) of article 2, where the expression "any third person" can easily be used. If thought necessary, the relevant explanations would be provided in the guide to enactment (see A/CN.9/406, paras. 146-148).

4. Consideration should be given to the deletion of article 7 concerning the "original". Unless negotiable documents are referred to, there is no case in fact in commerce, and particularly in international commerce, of a rule of law requiring information to be presented in its original form. The Model Law is not concerned with "negotiable documents"; negotiability will be discussed as part of the Group's planned future work.

When the requirement for an original arises from an agreement between the parties, it will be for the parties, in their agreement, to specify the cases in which a communication by electronic means will satisfy the required conditions.

If any customary procedure requires the presentation of originals, the procedure itself will gradually

change in a natural way, to adapt to the practices of the type of trade in question or of the region where the procedure is followed.

Thus, the usefulness of article 7 is limited. Its text, on the other hand, is ambiguous and subject to various interpretations in the case of expressions like "the standard of liability required ... in the light of the purpose for which the information was composed and in the light of all the relevant circumstances" and "the criteria for assessing integrity shall be whether the information has remained complete and unaltered". There are also conditions that are difficult to fulfil such as that "there exists a reliable assurance as to the integrity of the information ...".

It would be preferable to delete this article and instead to state that:

"This Law does not deal with negotiable documents [or with cases in which a rule of law requires information to be presented in its original form]".

5. Article 10, concerning variation by agreement, which is to be found in chapter III on communication of data messages, should be moved back to where it was during the first stages of the draft, since it is applicable to the whole law and not only to the case of communication of messages.

The article was moved in order not to allow parties, in the use of contractual freedom, to derogate from mandatory rules, and it was agreed to restrict such contractual freedom to communications between the parties. These arguments are erroneous and lead to results that are not intended and that are more restrictive, even, than when parties carry out their operations, or record them, through media documented on paper.

In any case, one must distinguish between the legal relationship between the parties and the effects of their acts on third parties. In the case of private relationships, of a commercial nature, between subjects of private law, the restriction of contractual freedom, with a few exceptions, is an obstacle to trade that should be removed.

For example, nothing should prevent the parties from agreeing otherwise than is laid down in article 8 regarding the admissibility and evidential value of data messages, when it is a question of settling a dispute between these parties through arbitration or even in the courts of the State. The same is true regarding what is laid down with reference to the retention of data messages as covered by article 9, as long as the agreement between the parties affects only the relationship between these parties themselves.

It will be different if the agreement is intended to be capable of causing effects in respect of the rights and obligations of third parties outside the relationship. Should it be thought necessary to clarify this point if the article is put back in chapter I, containing general provisions, the following paragraph could be added:

"The agreement between the parties shall not affect the rights and obligations of third parties."

6. It would be useful for article 13 to be expanded to cover not only cases of contract formation but all cases of manifestation of will, since there is no reason to limit the declaration of validity to the offer or acceptance of a contract. Consequently, it is suggested that paragraph (1) of article 13 should say:

"(1) Unless otherwise agreed by the parties, *any manifestation of will expressed by means of a data message shall have legal force*. A contract *or any other juridical act* shall not be denied validity or enforceability on the sole ground that a data message was used in bringing it about, where this is the case."

NAMIBIA

[Original: English]

We are generally in agreement with the suggested changes and analytic comments from the UNCITRAL Working Group on the Model Law on Legal Aspects of Electronic Data Interchange, and advise that we have no specific comments to make at this stage.

B. Intergovernmental international organizations

BANK FOR INTERNATIONAL SETTLEMENTS (BIS)

[Original: English]

We appreciate the efforts undertaken by UNCITRAL to harmonise certain legal aspects arising in connection with Electronic Data Interchange. At present, however, the Bank is not directly involved in the computerised exchange of standardised trade data, apart from S.W.I.F.T. messages. Due to the particular nature of the Bank as bank for central banks, we also do not have direct relationships to "trading partners" that make use of EDI.

Therefore, despite being very interested in the legal issues of EDI and closely following the respective developments, we are unable at this stage to provide specific comments on the draft Model Law.